IN THE

Supreme Court of the United States

October Term, 1952

No. 151

ROBERT E. STOEHR, trading as
STOEHR & FISTER,

Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Robert E. Stoehr, trading as Stoehr and Fister, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this case April 25, 1952.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

On April 25, 1952, the Court of Appeals, for the Third Circuit affirmed the judgment of conviction.

The Court of Appeals entered orders staying the issuance of the mandate until June 23, 1952. On May , 1952, this Court in accordance with Rule 37(b), Federal Rules of Criminal Procedure, extended the time for filing the Petition for Writ of Certiorari to and including June 23, 1952. This petition was filed within the period provided for in the rules of this Court.

OPINIONS BELOW

The opinion of the District Court (J. W. Murphy, District Judge) is reported in 100 F. Supp. 143, the opinion of the Court of Appeals (Kalodner and Staley, Circuit Judges, and Stewart, District Judge) has not yet been reported and is printed in the record at pages to

STATEMENT OF THE MATTER INVOLVED

The judgment of the Court of Appeals sought to be reviewed, affirmed a judgment convicting the petitioner of violating Section 145(b) of Title 36 U.S. Code.

The indictment contained three counts charging that the petitioner had wilfully and knowingly attempted to defeat and evade a large part of his income taxes for the years 1943, 1944 and 1945 by filing and causing to be filed a false and fraudulent income tax return for each year wherein he knowingly understated his net income and the amount of tax due thereon. He was tried by a jury and found guilty on all three counts.

The record disclosed that the petitioner was the owner and operator of a retail furniture store in Scranton, Pennsylvania. Edith Passetti, as bookkeeper, was in charge of the books of original entry. August W. Tross, petitioner's office manager, did all the posting, was in charge of the general ledger cards and prepared petitioner's financial statements. Donald C. Griffiths, a certified public accountant, prepared petitioner's income tax returns. The Government contended that Griffiths never made an audit of or examined petitioner's books of account, but relied solely on information

prepared by Tross and submitted by petitioner or at his direction (R. 424a-427a).*

Tross and Griffiths were key witnesses in developing the Government's case. They testified at length as to the method of preparing the said returns and as to alleged directions given by the petitioner to Tross in making up financial statements, etc. Although the indictment concerned only income taxes for the years 1943, 1944 and 1945, the Government was allowed, on redirect examination, for the purpose of showing intent, to question Tross about alleged manipulations between 1939 and 1943, which testimony was highly detrimental to the petitioner. Griffiths testified that he discovered the alleged fraud in April of 1947 after he had been unsuccessful in securing from Tross a balance sheet and reconciliation statement of petitioner's capital account for use in preparation of the 1946 income tax return. Griffiths finally prepared the return on the basis of partial information which had been supplied to him (R. 465a-Tr. 889). Griffiths further testified as to a meeting in his office with Tross and petitioner April 22, 1947, at which meeting he claimed that he first learned of the falsity of the 1944 figures, and further that both Tross and the petitioner admitted that the

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* "R." refers to the record filed in this Court as part of this proceeding. "Tr." refers to the transcript of the testimony forming part of the original record on appeal filed by the Clerk of the U. S. Court of Appeals for the Third Circuit in this Court.

statements furnished had been falsified to reduce petitioner's income taxes, and that when petitioner asked him what could be done he advised that "in a case of an honest mistake the normal procedure would be to file an amended income tax return, but in the case of a crooked mistake he would have to get his advice some place else" (R. 460a-464a). Neither Tross nor Sansenbach, Griffiths' assistant, who also was present on this occasion, corroborated Griffiths' testimony. On the following morning Griffiths reported the matter to the local office of the Bureau of Internal Revenue (R. 530a-532a), and an investigation was begun relative to petitioner's 1944 return.

When the agents of the Bureau contacted petitioner on April 23, 1947, he told them he felt there were certain discrepancies in his return not only for 1944 but also for 1943 and 1945 (R. 352a-353a, 395a).

The testimony of Tross particularly, and also of Griffiths, was most damaging to petitioner and petitioner's counsel considered it necessary and vital to the defense to cross examine these men at length in view of the fact that their testimony was at variance with that of the petitioner himself. It is the contention of the petitioner that in unduly restricting his counsel in the re-cross examination of these key witnesses, his defense was hampered and his case severely prejudiced.

A more detailed statement of the evidence of Tross and Griffiths, as well as the evidence in contention of

the petitioner, will be found as part of the Brief which is attached to this petition.

The petitioner attempted to put into evidence an offer in compromise of tax liability for the years involved, which offer was submitted to the Bureau of Internal Revenue after the initiation of the investigation but long prior to the indictment. The District Court excluded the offer and the Court of Appeals upheld its action.

During the course of the trial, the jury which had been sequestered by order of the District Court was taken to see a motion picture entitled "The Damned Don't Cry", a tale involving the subject of income tax evasion. The Court of Appeals held that the petitioner was not denied his right under the Sixth Amendment of the United States Constitution to a fair and impartial trial by reason of this fact. The petitioner argued in effect that it would be almost impossible to be assured of a fair and impartial trial after the jury had seen the motion picture mentioned.

On September 12, 1951, after judgment of conviction, petitioner was sentenced on each of the first and second counts of the indictment for a period of three years' imprisonment and a fine of $10,000, the prison sentences to run consecutively, or a total period of six years. The sentence also contained a provision that he be further imprisoned until payment of the fines imposed on Counts I and II unless otherwise discharged as provided by law; and the imposition of sentence to

be suspended on Count III and defendant placed on probation for a period of two years, the probation period to commence upon his release from prison after service of sentences imposed on Counts I and II; and further as a condition of probation, the defendant to pay all income taxes due the United States Government, with interest and penalties added thereto, not later than ninety days after the commencement of the probation period imposed in Count III (R. 712a-713a).

On said September 12, 1951, an appeal from said judgment was duly entered by the defendant.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that there had been no undue restriction by the District Court in the re-cross examination of the Government's witnesses Tross and Griffiths, both key and damaging witnesses, as to matters which not only related to the theory of the defense but also had a bearing on their credibility?

2. Did the Court of Appeals err in upholding the District Court's exclusion of an offer in compromise of his tax liability for the years involved submitted by petitioner to the Bureau of Internal Revenue after the initiation of an investigation as to his tax status but long prior to his indictment?

3. Did the Court of Appeals err in holding that petitioner was not denied his right under the Sixth Amendment, United States Constitution, to a fair and impartial trial by reason of the fact that the jury, which had been sequestered by order of the District Court, had been taken during the course of the trial to see a motion picture entitled "The Damned Don't Cry", a lurid tale involving the subject of income tax evasion especially in view of the Court of Appeals' acknowledgment that it is dangerous practice for juries to be allowed to attend motion pictures unless the nature of the picture is learned in advance?

4. Did the Court of Appeals err in holding that there had been no error in the trial court's refusing certain of petitioner's requests for instructions as to (a) the distinction between criminal and civil sanctions under the Internal Revenue Code, and (b) as to the petitioner's theory of defense that the alleged false income tax returns could have been prepared without his knowledge, consent or instruction?

5. Was the following condition of probation ordered by the Trial Court in suspending sentence on the Third Count of the indictment valid and legal—that petitioner pay all income taxes due the United States Government, with interest and penalties added thereto not later than ninety days after the commencement of the probation period—since said condition may prevent or hamper the proper adjudication of his civil tax liability?

REASONS FOR ALLOWANCE OF THE WRIT

1. Each of the questions presented herein embody questions of Federal law which have not been but should be settled by this Court.

2. The decision herein restricting the recross examination of key and damaging witnesses is at variance and in conflict with the decision of this Court in *Alford vs. United States,* 282 U. S. 687, 691-694 (1931).

3. The decision herein holding that the trial court did not err in excluding testimony as to an offer in compromise of his tax liability for the years involved submitted to the Bureau of Internal Revenue after the initiation of the investigation but prior to his indictment is at variance and in conflict with the decisions of the Sixth Circuit Court in *Heindel vs. United States,* 150 F. 2d 493, 497 (1945), of the Second Circuit in *United States vs. Matot,* 146 F. 2d 197, 198 (1944) and of the Seventh Circuit in *United States vs. Wicoff,* 187 F. 2d 886, 890-891 (1951), which hold that in cases of prosecution for crimes involving fraudulent intent evidence of subsequent statements and conduct of defendant are admissible.

4. The decision herein sustaining conviction of petitioner departs from the accepted and usual course

of judicial proceedings and is a violation of petitioner's rights under the Sixth Amendment of the United States Constitution, in that he was deprived of a fair trial by reason of the sequestered jurors having been permitted during the course of the trial to see a lurid motion picture entitled "The Damned Don't Cry", which involved the subject matter of income tax evasion, especially where no precaution was taken by the trial Court to learn in advance the nature of said motion picture.

5. The decision herein is at variance and in conflict with the applicable decision of this Court in Helvering v. Mitchell, U.S. in that the trial Court refused petitioner's requested instruction for a more specific charge as to the distinction between the civil and criminal sanctions imposed by the Internal Revenue Code.

6. The decision herein is at variance and in conflict with the applicable decision of this Court in *Spies v. United States,* 317 U. S. 492, in that the trial Court refused petitioner's request for instruction as to his theory of the defense to the charges in the indictment—that the key and damaging Government witness Tross would alone have been guilty of a violation of the Internal Revenue Code (Section 3793 (1)), if, for some unknown reason, he so manipulated petitioner's books and records, without the latter's knowledge, instruction or consent, even though apparently only the petitioner benefited thereby.

7. The decision herein appears to be in conflict with other applicable decisions of this Court.

8. The question as to the legality of the condition of probation imposed by the Third Count of the indictment (that defendant pay all income taxes due the United States Government, with interest and penalties added thereto not later than 90 days after the commencement of the probation period) embodies a question of Federal law which has not been but should be settled by this court.

Wherefore, petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Third Circuit commending that Court to certify and to send to this Court, for its review and determination on a day certain to be herein named, a full and complete transcript of the proceedings of that Court herein, be the case numbered and entitled in its docket as "United States of America vs. Robert E. Stoehr, Trading as Stoehr and Fister, Appellant" at No. 10,564, and that the judgment of that Court be reviewed by this Court and for such other relief as to this Court may seem proper.

ROBERT E. STOEHR,
Petitioner,
By CHARLES J. MARGIOTTI,
Counsel for Petitioner.

SAMUEL GOLDSTEIN,
Of Counsel.
Dated June . . ., 1952.

BRIEF IN SUPPORT OF PETITION

STATUTE INVOLVED

The Federal Statute involved is Section 145(b) of Title 26, U. S. Code, which reads as follows:

"Sec. 145. Penalties.

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

STATEMENT OF THE FACTS

The indictment contained three counts, each charging the petitioner with having wilfully and knowingly attempted to defeat and evade a large part of his income taxes for the years 1943, 1944 and 1945 by filing false and fraudulent income tax returns for each of said years. He was tried by a jury and found guilty in all counts.

This case is unique among recent decisions involving alleged violations of Section 145(b), 26 U. S. Code, in that the alleged guilt of the petitioner was based upon direct rather than circumstantial testimony. In the most recent cases, the Government has based its charge of alleged understated net income upon indirect proof of such net income, by one of the following three methods—(a) the bank deposit method; (b) the percentage method, and (c) the so-called net worth or net expenditures method of computing net income. In the instant case, however, the Government's case rested solely upon the credibility of two damaging and devastating witnesses who gave direct testimony as to the alleged violations.

Tross and Griffiths were key and damaging witnesses in developing the Government's case. It was the theory of the Government that for the years 1943, 1944 and 1945 Tross, on instructions from petitioner, had prepared two sets of financial statements, an accurate

one for the use of Tross and petitioner only, and a false one to be submitted to Griffiths as the basis for preparing petitioner's income tax return for each of those years. The total understatement of net income for those three years, according to the Government, was $370,571.82, and the claimed underpayment of taxes was $334,492.98.

The Government further contended that, at petitioner's request and direction and with his knowledge, in order to reduce the apparent net income and the amount of income taxes petitioner would have to pay, Tross would make in the records false entries whereby a portion of inventory was dropped, purchases and expenses overstated and sales understated. Likewise, petitioner's living expenses, the purchase of $110,000 in United States government bonds, and the payment of $32,847.57 personal life insurance premiums, were allegedly disguised on petitioner's records—personal expenses charged as business expenses, life insurance premiums charged as furniture, carpet and drapery purchases, and United States Bonds not listed as an asset or as a reduction in capital account. The Government contends that none of the foregoing was shown on the statements furnished to Griffiths.

Under the Government's theory of the case it was contended that in 1943 Tross explained to the petitioner the items and amounts used, but that in 1944 and 1945 the mechanics were left to Tross' discretion. Tross testified that in 1944 he suggested the formation of a family

partnership as a safe method of reducing petitioner's income taxes. He testified that in 1945 the figures had to be revised three times before petitioner was satisfied with the result.

For the purpose of showing intent, on redirect examination, the Government was allowed to question Tross about alleged manipulations between 1939 and 1943. Tross testified that, in the returns for said years, at petitioner's request and with his knowledge and direction, the amount of inventory was deliberately understated in order to minimize petitioner's income taxes for each of those years.

Griffiths claimed that he discovered the alleged fraud in April, 1947, after petitioner had sold his business in March, 1946, and after he had been unsuccessful in his repeated request made of Tross to secure a balance sheet and a reconciliation of petitioner's capital account for use in the preparation of petitioner's 1946 income tax return; that on April 16, 1947, at Stoehr's office, Tross had explained that he was unable to furnish these reports because he was $165,000 off balance in reconciling the petitioner's net worth; that Stoehr stated the only explanation for the discrepancies might be that for over a period of years they had written off certain obsolete merchandise; and that although both Tross and Stoehr had requested additional time within which to furnish these reports, he was insistent that they furnish the same, together with the books of account, which he had never seen, within

two days. Griffiths finally prepared petitioner's return without this information and on the basis of the partial information which had been supplied to him (R. 465a, Tr. 889). Griffiths claimed that on April 21, 1947, a partial memorandum listing certain United States bonds in the sum of $131,000 (G. Ex. 39-A and 39-B) was received in his office and that, in a telephone conversation, he had been advised by Stoehr that the amount shown on the memo was the difference he needed as far as petitioner knew to reconcile the capital account.

Thereafter, Griffiths arranged a meeting in his office with Tross and petitioner for the evening of April 22, 1947, at which meeting he claimed he first learned of the falsity of the 1944 figures. Griffiths testified that when they were confronted with his accusation as to the falsity of the 1944 figures, first Tross and then Stoehr admitted that the statements furnished him had been falsified to reduce petitioner's income taxes. Griffiths further testified that when he inquired as to the bonds shown on the memorandum submitted on April 21, 1947, both Tross and Stoehr advised him that these were the bonds "which had been taken out of the business by Stoehr." Griffiths testified that when Stoehr asked him what could be done under the circumstances, he replied that "in the case of an honest mistake, the normal procedure would be to file an amended income tax return; but in the case of a crooked mistake, he would have to get his advice some place else". (R. 460a-464a).

Neither Tross nor Sansenbach, Griffiths' assistant, who also was present on these occasions, corroborated Griffiths' testimony that: (a) petitioner had been advised on April 16, 1947, that Tross was out $165,000 in the reconciliation of the capital account, or (b) that petitioner had admitted on the evening of April 22, 1947, that he had knowledge that the statements submitted to Griffiths had been allegedly falsified.

On the following morning, April 23, 1947, Griffiths reported the matter to the local office of the Bureau of Internal Revenue (R. 530a-532a), and a revenue agent and a special agent were assigned to investigate Stoehr's 1944 return (R. 351a-352a).

On first being contacted by these agents on the same date, Stoehr advised them that he felt there were certain discrepancies in his return not only for the year 1944, but also for the years 1943 and 1945 (R. 352a-353a, 395a). The agents claimed that a preliminary examination of petitioner's books and ledger cards showed that the 1944 trial balance was out over $150,000. Thereafter Tross furnished additional cards whereon he encircled the alleged unsupported entries of sales, purchases and expenses. The investigation which followed led to petitioner's indictment.

As opposed to the Government's theory of the case, that of the defense was that Stoehr had never given Tross any instructions to prepare statements showing a reduced net income for the purpose of reducing the

taxes due thereon, or that he had knowledge that Tross had done so. He admitted that he had signed the returns, caused them to be filed, and paid the tax stated to be due thereon. He claimed that he trusted the bookkeeping to Tross and others whom he employed for the purpose of making a full and accurate accounting of the sales, purchases and expenses of the business. He maintained that he had never told anyone to falsify any record or to make any entry which did not correspond to the facts (R. 570a, 573a-574a, 577a-578a); that he had given no instructions to Tross to charge as business expenses the paid-up insurance policies and the purchases of government bonds; and that he had no knowledge that the net income shown on the return differed materially from the information contained in the daily and monthly report submitted to him.

Stoehr denied Griffiths' testimony that on the evening of April 22, 1947, at Griffiths' office, he had admitted that he had knowledge that his records had been allegedly falsified for the purpose of reducing the taxes to be paid. Petitioner claimed that he, as well as Griffiths and Sansenbach, the latter's assistant, had been unable to persuade Tross to furnish the requested reports, and that since Tross was no longer in his employment he could not compel him to do so. He testified that on the evening of April 22, 1947, he had informed Griffiths that if there was anything wrong in his return he wanted Griffiths to make a complete audit of his books and records, and that he wanted to pay any tax that might be due the Government (R. 596a-

598a). However, although Griffiths advised Stoehr to file amended returns for the years involved and "to do it quick" Griffiths refused to prepare and file such returns, and on the following morning made the hereinbefore mentioned report to the Internal Revenue agents.

On cross examination, petitioner testified that he first decided to sell his business in January of 1946 (Tr. 1568). He wrote one Arthur Bierman, of Dayton, Ohio, a letter dated January 19, 1946, submitting certain data relative to the assets and liabilities of the business (D. Ex. 71, Tr. 1569-70, App. 616a). The enclosed net worth statement as of December 31, 1945, was prepared prior to the preparation of the 1945 return (R. 633a).

Petitioner insisted that he never examined more than the front page of the return; never compared the figures thereon with those in the comparison book or checked the calculations made (Tr. 1561, 1572-1574). He did not blame Griffiths for the status of his tax matters and did not believe that Griffiths was in any manner responsible for the variance between defendant's records and his returns (R. 619a-620a). The only explanation he could make for Tross' conduct, as testified to by Tross, was that Tross had prepared inaccurate statements for submission to Griffiths for the tax years 1943, 1944 and 1945 for the same reason he had submitted inaccurate information to Griffiths for the year 1946, as a result of which petitioner had been caused

to make an overpayment of some $62,000 in taxes (R. 620a). In short, he denied having made any request or having given any direction to Tross to falsify his records on his behalf, and insisted that he never had any knowledge that such things were done.

The decision of the District Court, as well as the decision of the Court of Appeals for the Third Circuit, recognized that the Government's case involved primarily the question of the credibility of the key Government witnesses, Tross and Griffiths.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THERE HAD BEEN NO UNDUE RESTRICTION OF THE RECROSS EXAMINATION OF THE KEY AND DAMAGING GOVERNMENT WITNESSES TROSS AND GRIFFITHS

The Court of Appeals' decision is in clear conflict with the applicable decision of this Court in *Alford v. United States*, 282 U. S. 687, 691, 694 (1931). Since the matters brought out on recross examination arose for the first time on the witness' redirect examination, petitioner had the right to recross examine these witnesses as thoroughly as necessary to impeach and discredit them.

The most important single issue for the jury's consideration in this case was the credibility of the Government's witnesses Tross and Griffiths as opposed to that of the petitioner. Under the conflicting theories of the Government and the defense, the jury could have found that Tross was either an accomplice of the defendant or that he had prepared the alleged false statements for submission to Griffiths without the knowledge of or instructions by the defendant, and purely for his own personal reasons. Under said con-

flicting theories the jury also could have found that Griffiths' testimony as to defendant's alleged admissions were true or that they were false and incredible for the reason that he was trying to cover up and exculpate his failure to properly advise his client under the circumstances and further to maintain his professional reputation. Under the theory of the defense, no explanation could be given for Tross' testimony as to the receipt of direct instructions from the defendant and his motive was left as a matter of conjecture for the jury. Defendant submits that the undue restriction of the re-cross examination of these material and important Government witnesses caused such prejudice to the defendant as to necessitate a new trial.

It is fundamental that cross examination of a witness is a matter of right. In *Alford vs. United States*, 282 U. S. 687, a prosecution for using mails to defraud, the Supreme Court held that the Trial Court's refusal to permit cross examination of a Government's witness respecting his residence was prejudicial error. Mr. Justice Stone said at 282 U.S. 689, 691, 692:

> "Cross examination of a witness is a matter of right. The Ottawa, 3 Wall. 268, 271, 18 L. Ed. 165. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood. * * * That the jury may interpret his testimony in the light reflected upon

it by knowledge of his environment, * * * and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. * * * *Counsel often cannot know in advance what pertinent facts may be elicited on cross examination.* For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. * * * To say that prejudice can be established only by showing that the cross examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. In this respect a summary denial of the right of cross examination is distinguishable from the erroneous admission of harmless testimony." (Italics ours).

In *United States v. Michener,* 152 F. (2d) 880, 884 (C.A. 3), this Court adhered to and extended the doctrine of the *Alford case.* In the *Michner case* (152 F. (2d) 881, 884), it was held:

> "That this right (of cross examination) is not limited to such cross examination which will necessarily tend to discredit the testimony in chief is apparent from the Alford decision."

The credibility of these two witnesses, Tross and Griffiths, was a critical point in the case, since the outcome depended on whether the jury accepted their

version or the defendant's version of what had occurred. The Trial Court summarily cut off cross examination of these key Government witnesses in the following instances.

As to the witness Tross, the trial court limited his recross examination on the following very significant points: (a) Whether Tross had engaged in manipulating the income tax returns of Stoehr's predecessor, prior to 1939 (R. 346a-348a). (b) That defendant had paid taxes in 1946 on $71,187.40 which Tross had deducted from the 1945 sales and had restored in 1946 (R. 367a-369a).

The theory of the defense was that if there were an understatement of net income Tross had prepared the alleged false financial statements for submission to Griffiths without the knowledge or instructions of the defendant. Defendant was entitled to show that Tross alone might have been guilty of a violation of Sections 3793(b)(1), 26 U.S.C.A., which provides that the filing or assistance in filing of false tax returns shall be a crime whether or not such falsity or fraud is with the knowledge or consent of the person required to make such return. That statute recognizes that there are situations where parties, charged with a responsibility of preparing a taxpayer's return or charged with the responsibility of preparing information to be submitted in connection with the preparation of such return, do, without the knowledge or request of the taxpayer so maintain his books and records as to reduce the

amount of taxes the principal should pay (See *United States v. Kelley,* 105 F. (2d) 912, 917 (C.C.A. 2, 1939)). The answers to defendant's proposed questions might have given the reason for Tross' conduct and also raised a reasonable doubt as to the credibility of Tross. See *United States v. Augustine,* 189 F. (2d) 587, 590, 591 (C.A. 3, May 24, 1951).

When asked by the District Judge what motive he could give for Tross' self-admitted manipulations of the cards and statements, defendant testified that it was the same reason that impelled Tross to cause Stoehr to make the overpayment of the sum of $60,000 in taxes for the year 1946 (R. 620a). If the proffered questions as to the over-payment of the 1946 taxes and as to the manner in which Tross kept the books of defendant's predecessors prior to 1939 had been allowed to be asked, from the answers given the defendant might have been able to establish a motive why Tross had conducted himself apparently for the defendant's benefit, but without the defendant's knowledge or consent. *Defendant then could have developed his theory of defense by showing:* (a) that Tross was either such an incompetent bookkeeper, that, in order to balance his books he had to make allegedly false entries; or (b) that Tross, having started to manipulate the records of the defendant's predecessors in business prior to 1939 he had become so involved in reconciling entries and restoring figures taken out in previous years that he was forced to continue to make such entries after 1939, without the defendant's knowledge, consent or

direction, but in order to avoid detection of his prior conduct. It is possible, had this cross examination been permitted, that some of this witness' testimony could have been shaken. The answers to the first excluded subject of cross examination might have raised the inference that Tross was a grossly negligent bookkeeper and had so carelessly kept the records of defendant's business that he was unable to prepare accurate statements. The answer to the second subject of excluded cross examination might have raised the inference that Tross had, with or without the knowledge of the defendant's predecessors in business, so manipulated the records of the business and had become so involved in trying to reconcile his accounts that he could not submit accurate financial statements. The answer to both subjects might have raised the inference that Tross, for his own personal reasons, might have been lying about the instructions he allegedly received from the defendant. The likelihood of this undue restriction of cross examination causing prejudice to the defendant necessitates a new trial: See *United States vs. Augustine* (C.A. 3), 189 Fed. (2d) 587.

The answers to the proposed questions asked of Tross may have developed a situation analogous to that in the currently reported discoveries of peculations of hundreds of thousands of dollars by trusted bank employees over a period of twenty or more years through a system which concealed the employees' thefts from both the bank officials and the bank examiners. *Defendant was entitled to develop on the cross examination of*

Tross the motive for his admitted manipulations of defendant's records and financial statements. Under the circumstances of this case, such motive could be developed only through the cross examination of Tross. Defendant was entitled to have the jury consider all the possible motives for the alleged falsification of the cards and financial statements.

The Court of Appeals clearly misunderstood the purpose of the offer of proof relative to the proposed recross examination of Tross as to whether he had engaged in manipulating the income tax returns of petitioner's predecessors in business prior to 1939. It recognized that on direct examination, Tross was interrogated only about the years covered by the indictment, 1943-1945. Then on redirect examination the prosecution was allowed to question Tross about manipulations between 1939 and 1943. The Court of Appeals states that in his offer of proof "defense counsel stated that his purpose in developing this evidence was to show that Tross had engaged in manipulating figures for his previous employer without the knowledge of that employer and for the purpose of refuting the inference that Tross had learned to manipulate figures at the request of defendant".

On the contrary, the stated purpose of petitioner's offer was to establish some reason or motive for Tross's manipulation of petitioner's books and records for the apparent benefit of petitioner, but without his knowledge, instruction or consent.

As to the witness Griffiths the trial court erred in sustaining objections to questions addressed to him on cross examination relative to advice given by him to defendant on the evening of April 22, 1947, and also to his knowledge of the Treasury Department's policy, usage and practice relative to voluntary disclosures by taxpayer (R. 525a-528a, 529a-530a). This testimony was offered in evidence for the purpose of affecting the witness' credibility and not on the ground that such voluntary disclosure had been made as to warrant defendant's immunity from prosecution.

The defense contended that Griffiths' testimony should be considered by the jury in the light of his treatment of Stoehr on the evening of his discovery of the alleged fraud. The witness was a certified public accountant in the city of Scranton, who represented himself to be qualified as an expert on accounting methods and procedure. If he had no knowledge of the Treasury Department's policy, then his lack of knowledge could be considered by the jury in weighing the credibility of his testimony. If he did have knowledge of the Treasury Department's policy and had not advised Stoehr to make a voluntary disclosure (whether or not he believed defendant guilty of fraud) when defendant requested advice as to what he should do, and if Griffiths later discovered that it was due to his desertion of his client that defendant had been indicted, then the jury was entitled to consider whether Griffiths was prejudiced in his testimony because he was trying to defend and justify his conduct in reporting this

matter to the Revenue Agents and in not having given the proper advice to Stoehr.

Such motive of self-justification, if proved, might well have discredited his testimony as to defendant's alleged admission. The District Judge himself recognized that, if Griffiths' testimony were true, Griffiths had improperly advised Stoehr in the premises. The court said: "Certainly the Court is of the opinion, we will say that if there had been some steps taken that day we would not be here" (R. 527a). Therefore, it is submitted that the excluded testimony was admissible for the purpose of discrediting Griffiths' testimony. See *District of Columbia v. Clawans,* 300 U. S. 617, praise them: *Alford v. United States,* 282 U. S. 687, (C.C.A. 7, 1930).

Clearly the consideration asked by defense counsel of these key Government witnesses not only related to the theory of the defense but also had a direct bearing on their credibility. It is obvious that prejudice ensued from this denial of the opportunity to place the witnesses in their proper settings and thus to put the weight of their testimony and their credibility to a test, without which the jury was unable fairly to appraise them: *Alford v. United States,* 282 U. S. 687, 692.

The *Alford* case was cited with approval by this Court in *United States v. Augustine,* decided May 24, 1951, 189 F. (2d) 587 (C.A. 3). Defendant in that case was convicted in the District Court of wilfully attempt-

ing to evade his Federal income tax for the year 1942, and he appealed. Judgment was affirmed, 185 F. (2d) 407. On rehearing the Court of Appeals, Goodrich, Circuit Judge, held that where a Government witness testified that a deceased person, to whom the defendant claimed he had paid $236,000 in 1942 as a business expense, had been very poor, that disallowance on cross examination of questions as to whether the deceased person had bet on horse races, whether the witness had filed a claim against himself as an executor of the deceased person's will for money due him, and who the beneficiary in said will was, was an undue restriction of cross examination and was prejudicial to the defendant. In reversing the judgment of the District Court this Court said (189 F. (2d) 587, 590, 591):

> "More serious, however, is the problem in connection with limitation of cross examination of a witness named Cesare. This man was called as a rebuttal witness by the prosecution. The defendant had testified positively and at length to the effect that this $236,000 in question had been turned over in cash, from time to time, to a man named Peter Valetta. Valetta was said to have rented his own equipment and other equipment which he procured to the Augustine Construction Company for this good-sized job it was doing in Bethlehem. Valetta died about 1943. This witness Cesare, testified in behalf of the Government that Valetta's 'financial condition was very, very poor.' Cesare said that he was attorney-in-fact for Valetta in the latter's

lifetime. He stated that he was to receive a portion of the profits Valetta made and that he never got any such profits. He was executor of Valetta's will.

Cesare was a devastating witness against the defendant. If his story was believed Valetta was a poor man, lived on the ragged edge, was in bad health and made no apparent outlay of large sums of money for anything. Acceptance of this position of Valetta in the business and social world would greatly weaken, if not entirely discredit, defendant's story of payment of $236,000 in cash to him for equipment rental in one year.

* * * * * * * *

With reluctance we conclude that there was an undue restriction in the cross examination of this important witness. *His credibility was a critical point of the defendant's case. Likewise* the unhappy *financial* situation outlined by the witness in his *history of Valetta was open to further development and perhaps some prodding.* It is possible, had the inquiry been permitted to widen out, that some of this witness' testimony could have been shaken. If it could, *the defendant was entitled to shake it.* If this were a collateral point extended cross examination of the witness would not have been so important. But *the heart of the case was whether defendant had paid the money over to Valetta.* Cesare's testimony made this appear extremely unlikely. The answers to defendant's ques-

tions might have raised the inference that Cesare was mistaken, or deceived by Valetta, or that Cesare was lying about Valetta's financial condition. We conclude that the cross examination was unduly restricted and that the likelihood of this causing prejudice to defendant necessitates a new trial. Cf. Alford v. United States, 1931, 282 U. S. 687, 692, 51 S. Ct. 218, 75 L. Ed. 624." (Italics ours).

Petitioner submits that the undue restriction of their cross examination of these key and devastating Government witnesses was prejudicial error.

II.

THE COURT OF APPEALS ERRED IN HOLDING INADMISSIBLE PETITIONER'S OFFER IN COMPROMISE OF HIS TAX LIABILITY SUBMITTED TO THE BUREAU OF INTERNAL REVENUE AFTER THE INITIATION OF THE INVESTIGATION BUT BEFORE THE DATE OF THE INDICTMENT

On July 30, 1948, petitioner submitted to the Bureau of Internal Revenue an offer in compromise of his tax liability for the years 1943, 1944 and 1945 in the sum of $350,000.00. This offer was made for the purpose of settling all civil *and/or* criminal liability for the years involved. The offer was accompanied by a certified check for $200,000.00, the payment of the remainder being promised thirty days after the acceptance of the offer by the Government. Petitioner also proposed that the offer would be adjusted if it should appear that a larger amount were actually owed the Government (D. Ex. 76). The District Court rules that this evidence was inadmissible and also denied defendant's request to charge the jury, "if (they) should find that the defendant has always been willing to pay his taxes in any amount. . . . they may consider this circumstance in his favor in determining whether he had wilfully attempted to evade and defeat payment of his

income taxes". Petitioner submits that his subsequent conduct was relevant to the issue whether or not he had wilfully attempted to evade his income taxes for the years involved, and also as explanation of the delay on his part to make any payment on taxes that might be due.

This subsequent conduct upon the part of the defendant, as well as his declarations of his willingness to pay whatever taxes might be found to be due, was material and relevant to the issue whether or not he had willfully attempted to evade his income taxes for the years involved. Since the Government had offered testimony that not only were the taxes allegedly understated but also that said taxes were still due and owing, the defendant was entitled to whatever inference of lack of wilfullness might reasonably be drawn from the fact that as soon as the error in the returns was discovered and *long before he was indicted* he had attempted to make payment thereof.

In *Heindel v. United States* (C.C.A. 6), 150 F. (2d) 493, the Court held that in prosecutions for attempting to evade corporate taxes and for conspiring to do so, where the Government introduced an admittedly correct amended return, the defendants should have been permitted to prove that the additional taxes were promptly paid. The Court stated at (pp. 497-498):

> "Since the case must be retried it is necessary to add that the court should have admitted evi-

dence of the prompt payment of the additional tax shown by the amended return. The issue framed was in respect to the good faith of the defendants in the payment of taxes. There were circumstances which bore both on their honest purpose and upon their lack of it. Final determination rested with the jury and the defendants were entitled to whatever inference might reasonably be drawn from the fact that as soon as the error was discovered and confirmed they paid their taxes. This is not a case where, by payment, it is sought to vitiate a crime. Hancey v. United States, 10 Cir., 108 F. 2d 835; Weinhandler v. United States, 2 Cir., 20 F. 2d 359. There was no persistent denial of the error as in Emmich v. United States, 6 Cir., 298 F. 5. *The defendants were entitled to show anything that might have a tendency to demonstrate, however slight such demonstration might be, that they were honest and not dishonest persons in their dealings with the Government.* It is to be noted that at the time the additional tax was paid the appellants were not under compulsion, attributable to an assertion of deficiency, distraint, or threat of prosecution. Indeed, the government did not seek indictment until approximately two years after discovery of the error. The government urges that the fact of payment was already in evidence by the Cashier's stamp upon the amended return, and so the exclusion was without prejudice. It is not disclosed, however, that this

stamp was called to the attention of the jury, and the government's argument on this score but brings into bold relief the error in excluding oral evidence of payment." (Italics ours).

In *United States v. Matot* (C.A. 2), 146 F. (2d) 197 (1944), an appeal from a judgment of conviction under an indictment charging Matot as an abetter of the cashier of a national bank in the wilful misapplication of the bank's monies in violation of Section 592 of Title 12 U.S.C.A., the appeal turned substantially upon the exclusion of an offer of testimony by Matot who took the stand in his own defense. After the cashier's defalcations were discovered it appears that the bank directors called Matot before them and asked him to make good the overdrafts. He said he would make arrangements to do so and also to pay his notice. His testimony to this interview the Trial Judge admitted, but he excluded the interview three or four days later between Matot and the bank's president, his testimony as to which would have disclosed that he suggested to the president the immediate sale of some of his real estate, and that the president urged him not to sell it at a sacrifice. In an opinion reserving the judgment of conviction, L. Hand, Circuit Judge, stated:

"* * * Indeed, the prosecution itself concedes that it was obliged to prove fraudulent intent. The situation was curious. Matot was a man, engaged in a business, apparently prosperous; he had ample means to meet his indebtedness to the bank; and

he must have known that at some time and in some way he would be called to meet his overdrafts. It is hard to believe that he could have really intended to defraud the bank, particularly because, if he did, he was bound to fail. Indeed, Holmes' own defalcations were also curious; it remains totally inexplicable why he should have accommodated his friends without any ascertainable profit to himself and at great risk. *For these reasons any evidence of Matot's good faith was highly important.* True, the judge allowed him to testify to his interview with the Board of Directors, where he said that he 'would make arrangements to have everything cleaned up'; but we cannot see what difference there was between that and the later interview with the president at which he volunteered to sacrifice his real property. It is of course possible that the offer indicated only a change of heart, an effort to avoid the consequences of what he had done; but it was also possible to take another view and read it as confirmation of his denial that he had ever contemplated a fraud, and that he was ready to go to lengths to protect the bank. That possibility appears to us enough, especially in so close a case, to entitle him to lay the interview before the jury to interpret as they would."

"Although Matot's testimony was the only direct evidence upon his intent, *it was not fair to confine him to a bare denial*—never impressive in the mouth of the accused. *He was entitled to cor-*

roborate that denial by any conduct which confirmed it." (Italics ours)

The District Court in its opinion (100 F. Supp. 143, 162) as well as the Court of Appeals, misconstrued the purpose of the offer in compromise. He stated that "after the filing date defendant could not escape criminal liability merely by paying the additional tax". Petitioner submits that this exhibit (the offer in compromise) was not offered as a "shield" from criminal prosecution because 26 U.S.C.A. Sec. 3761, the compromise statute, does not give immunity from criminal prosecution to one who has violated tax law unless there has actually been a compromise. However, this exhibit and the testimony in connection therewith was admissible as relevant to the question of defendant's *intent* at the time he filed his tax returns.

The Court of Appeals recognizes that there is a conflict of decision relative to the admissibility of evidence of subsequent conduct in fraud cases. In its opinion it states:

> "In cases of prosecution for crimes involving fraudulent intent, some courts have displayed increased liberality in admitting evidence of subsequent statements and conduct of defendant. See: Heindel v. United States, 150 F. 2d 493, 497 (C. A. 6, 1945); U. S. v. Matot, 146 F. 2d, 197, 198 (C. A. 2, 1944), U. S. v. Wicoff, 187 F. 2d 886, 890-891 (C A. 7, 1951)."

The Court of Appeals held that it was not incumbent upon the Trial Court to initiate an inquiry among the jurors as to the effect of the movie or to declare a mistrial merely on the hearsay account of the version of the plot by counsel. The Court held that the burden was on the defendant to show the reasonable possibility of prejudice. However, the record clearly shows that the District Court arbitrarily cut off any possibility of an examination of the jurors on the possible prejudice that may have been caused by their having seen this movie. In a serious criminal case the Trial Court, upon being notified of the jurors having seen such a movie, should have followed the practice of the Court of Appeals in this case in either having the movie shown to himself and all counsel, or in examining the transcript of the dialogue of the motion picture involved. Regardless of the Court of Appeals belief as to the effect of the jurors having seen this movie, that Court did recognize that "The Damned Don't Cry" is indeed a lurid tale—its locale is the underworld; it is a story of rackets and gangland disloyalty.

This moving picture incident was called to the attention of the Trial Court in the following manner (R. 552a-554a):

"By Mr. Margiotti:

A matter of serious consequence has been called to our attention this afternoon. We wish to state for the record that on Friday night last the jury was taken to a theatre known as the Colonial Theatre at which was shown the picture 'The

Damned Don't Cry' * * *. The picture, portrayed the wife of an old field worker leaving her husband * * *, and later she found a position as a model in a small dress shop. She got into a small racket of leading customers to a 'clip joint'. She met a young certified public accountant and she introduced him to the proprietor * * * as a representative of the Treasury Department of the United States. He corrected the introduction by saying that he was a certified public accountant. The proprietor advises that he needs a good certified public accountant because of mistakes in the income tax return for the reason that the Treasury Department has called him in for a conference. The certified public accountant suggested that he may be able to save him a lot of taxes in many ways. The night club proprietor introduced the certified public accountant to the racketeer operating race wire service and bookmaking. The girl meets a racketeer and becomes his mistress and poses as an oil heiress, and she later double-crossed him for one of his disloyal henchmen and the latter is killed by a racketeer who also kills the girl. The picture ends with the certified public accountant and the racketeer killing each other. The picture opens with the finding of a dead racketeer. Police found that he knew an oil heiress and tried to find her, and in an effort there was a teletype shown: 'Internal Revenue Records Show No Return Filed.' In the conversation between the certified public

accountant and the night club operator a remark is made: 'The Secretary of the Treasury won't like that.' And in connection with the picture the certified public accountant and the Treasury Department there is a remark: 'Self-respect is nothing; money counts. You have to belt and kick your way up.' The picture in its entirety concerns crime, cheating the Government on income tax, gambling, rackets, loose morals."

* * * * * * * *

During the time the picture was being shown and while a question of income tax, or something pertaining thereto, was being shown one juror is alleged to have said: 'We have had enough of that.'

* * * * * * * *

I call all these facts to the attention of the Court because I feel it is my duty to do so at this time, and I move for a continuance of the case—the withdrawal of a juror and the continuance of the case based principally upon the jury being taken in a body to see this picture during the trial of this case because the picture was prejudicial to alleged income tax evaders as well as crime generally."

Following this, the record shows (R. 554a-566a) that although the fact that the jury was taken to a movie had been verified by the Marshal and the Deputy Marshal, the court undertook an extended interrogation without making the slightest reference to the subject matter of the moving picture or whether or not

the jury was in any manner affected or prejudiced. To the contrary, it is apparent from the record that the court was attempting to develop some type of misconduct on the part of defense counsel either in obtaining this information or in attending Mass the preceding Sunday at a time when certain members of the jury were also in attendance. The later reference by the court to the calling of the grand jury was plainly a threat to defense counsel in connection with the court's implication that he was guilty of misconduct (R. 566a):

> "By the Court:
>
> You called it to the attention of the Court and made a motion; the motion is denied. I might say if anything more comes of it we will be delighted to call the grand jury if there is a need for it."

The purpose of keeping the jury in one body during the trial of the case and not permitting them to separate except under the supervision of the bailiff or officers of the court, is to make sure that nothing they read, see, or hear shall influence them in the consideration of the case committed to them. 23 *C.J.S., Criminal Law,* Sec. 1348, page 1010. If it is made to appear that a jury sworn to try a case is subjected or exposed to any matter or thing which might tend to prejudice or influence their consideration of the case, or if the behavior of any member thereof is unbecoming to a gentleman of the jury, a presumption arises against impartiality and defendant's position. *Griffin v. United States,* 295 Fed. 437, at 440 (C.C.A. 3, 1924). According to the Trial Court, "The burden was upon counsel for the defendant

This conflict of decision is recognized in the recent decision of the Court of Appeals for the Fifth Circuit in *Barshop vs. United States*, 191 F. 2d 286, 293 (1951): See 6 Wigmore on Evidence, Section 1732, pages 103-104.

Petitioner submits that the evidence of his subsequent conduct in submitting said offer in compromise was a probative value in establishing a state of mind or intent at the time of the alleged criminal acts and that, therefore, its exclusion was prejudicial error.

III.

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER WAS DEPRIVED OF A FAIR AND IMPARTIAL TRIAL BY REASON OF THE SEQUESTERED JURORS DURING THE TRIAL HAVING BEEN PERMITTED TO SEE A LURID MOVIE INVOLVING THE SUBJECT MATTER OF INCOME TAX EVASION

The Court of Appeals recognizes that the constitutional right (United States Constitution, Amendment Six) of the petitioner to a fair and impartial trial *might* have been prejudiced by the sequestered jurors towards the close of the trial, having been taken (for some unknown reason) to see a lurid motion picture entitled "The Damned Don't Cry". In its opinion, the Court of Appeals states:

> "It is our belief, none the less, that films about crime and the underworld are probably not the best entertainment for juries engaged in a criminal case of any kind. We concur in the view expressed by the Criminal Court of Appeals of Oklahoma, that it is dangerous practice for juries to be allowed to attend motion pictures unless the nature of the picture is learned in advance. Bernell v. State, 74 Okla. Cr. 92, 123 Pac. 2d 284, 289 (1942)."

to show that prejudice had resulted" (Opinion, R. 695a). We take sharp issue with that assertion, for we contend that on the showing made in the statement of defendant's counsel it would be presumed that the incident related had been prejudicial to defendant, so that the burden was on the Government to establish that no prejudice could have resulted. Cf. *Mattox v. United States,* 146 U. S. 140, 151; *Stone v. United States,* 112 F. (2d) 70, 77-78 (C.C.A. 6, 1940); *Griffin v. United States,* 295 Fed. 437, 440 (C.C.A. 3, 1924). We do not interpret the cases cited by the Trial Court (Opinion, R. 695a) as stating any rule which would be applicable to the facts of this case.

This was not a case where the jurors were allowed to separate during the trial, as in *Holt v. United States,* 218 U. S. 245, from which the Trial Court quoted in its Opinion (R. 695a). Instead, the jurors here were sequestered by Order of the Court, thus creating a situation where, as we contend, there was a *duty on the Court itself to take some steps to negate the presumption of prejudice which necessarily arises when a sequestered jury in a tax evasion case is entertained with a movie in which one of the villains is a tax evader.* The exact nature of the remark made by one of the jurors during the showing of the movie, concerning which the Court was uncertain (Opinion, R. 695a) is immaterial (R. 561a-562a). Since in such circumstances the burden of disproving prejudice was on the prosecution, the comment of the Court (Opinion, R. 695a) that defense counsel "made no request to ques-

tion the jury or to have the Court question them" is likewise entirely irrelevant.

Even assuming *arguendo* that it was incumbent upon the defendant to initiate some inquiry among the jurors as to the effect of the moving picture, some opportunity should have been given between the making of the motion for a mistrial (R. 554a) and the denial of the motion (R. 566a) for some such request. Instead the entire time was devoted to an inquisition by the Court itself into the source of the information about the movie incident and also into the circumstances surrounding the attendance of one of defendant's counsel at Mass the preceding Sunday when certain members of the jury were also in attendance. The Trial Judge left no doubt that he was implying misconduct on the part of defense counsel, for in denying the motion for a mistrial he added that "if anything more comes of it we will be delighted to call the grand jury * * *" (R. 566a). Whatever the real motive behind this unwarranted implication might have been, we submit that if the Trial Court considered that the defendant had the burden of proof in this matter, some reasonable opportunity to bring out any further pertinent facts should have been afforded before the motion for a mistrial was denied.

In its Opinion on the denial of the motion for new trial the District Court also relies upon the reference to movies in the charge of the jury (Opinion R. 695a). That reference was as follows (Charge, R. 666a):

"* * * Disregard anything you have seen or heard in the movies, if you were at any movies. * * *"

Moving pictures are so forceful and dramatic a medium, however, that the prejudicial effect of seeing a movie in which one of the villains was a tax evader was undoubtedly impressed indelibly on the minds of the jurors, constituting error which we submit could not be cured by the Charge. Cf. *United States v. Venuto,* 182 F. (2d) 519, 523 (C.A. 3, 1950). In any event the error certainly called for a specific reference to the incident complained of, rather than a vague, indefinite reference to "anything you have seen or heard in the movies, if you were at any movies."

"There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled."

Baker v. Hudspeth, 129 F. (2d) 779, at 781.

Petitioner respectfully submits that taking this sequestered jury to see a moving picture involving the same subject matter as the trial itself raises a substantial question as to whether he was denied his right under the Sixth Amendment to a fair and impartial trial, particularly where the trial court held that the burden of proof of establishing prejudice was on the defendant.

IV.

THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S REFUSAL OF PETITIONER'S REQUEST FOR INSTRUCTIONS: (A) AS TO THE DISTINCTION BETWEEN CIVIL AND CRIMINAL SANCTIONS UNDER THE INTERNAL REVENUE CODE, AND (B) AS TO THE PETITIONER'S THEORY OF THE CASE

In his request for instruction 19, the defendant asked the Trial Court to charge the jury as follows (R. 643a):

> "19. If the jury should find that there is any income tax due by the defendant to the Government for any one or more of the years 1943, 1944 and 1945, inclusive, they are instructed that the Government is entitled to collect this tax in a civil proceeding against the defendant, irrespective of whether the failure to pay the income tax for any of said years was due to honest mistakes, negligence or fraud. Therefore, the jury must not conclude in this case that unless the defendant is convicted, the Government cannot compel the payment of said tax."

In Request 24, defendant asked the Trial Court to charge further on said point as follows (R. 643a-644a):

> "24. The outcome of this case will not determine the amount of taxes and civil penalties which the defendant may ultimately be required to pay. In the event of an acquittal it will still be open to the Government to assert a tax liability for these years or for other years in which the taxpayer may have understated his income or filed no return."

Petitioner submits that said Requests 19 and 24 clearly propound the law applicable to this case and were warranted by the evidence.

The civil sanctions of Section 293(b), I. R. C. are distinguished from the criminal sanction of 145(b), and the invocation of one does not exclude resort to the other: *Spies vs. United States,* 317 U. S. 492, 495, 63 S. Ct. 364; *Helvering v. Mitchell,* 303 U. S. 391, 399; *U. S. v. Sabourin* (C.A. 2), 157 Fed. (2d) 820. In *Helvering v. Mitchell,* supra, the Supreme Court has held that the addition to the tax of a civil fraud penalty is not barred by an acquittal in a criminal prosecution. On the other hand, a criminal prosecution is not barred because of the imposition of a civil penalty: *Slick v. United States,* P-H Fed. Section 18,609.

The Trial Court nowhere in his charge to the jury covered said requests, nor clearly explained the distinction between civil and criminal sanctions. The

Court instructed the jury on this point as follows (R. 659a-660a):

> "The Penalties imposed by Congress to enforce the tax laws embrace both civil and criminal sanctions.
>
> And we now reiterate what was said to you during the course of the trial: So far as—and as pointed out to you so clearly by defense counsel in his closing—so far as taxes are concerned, when the due date comes you are supposed to declare and pay. If you don't declare and pay, there are certain civil ways of getting it. However, in order to have people conform with the law and to pay their taxes when they are due and to declare them when they are due, there is a criminal sanction; and the law says that if you wilfully attempt in any manner to evade or defeat any tax imposed by this chapter you are guilty of a felony.
>
> It is that charge which is in this Court, and it is that charge which we are trying. This is not the civil side; this is not the tax collector. This is the United States Judge and the United States jury in a United States Court."

Petitioner submits that under the foregoing instruction the jury must have received the inference that the defendant had to be convicted in order that the Government might have recourse to the civil sanction for the purpose of collecting whatever taxes might be due by the defendant. In right and justice, the defendant

had the right to have the Court instruct the jury properly as to the distinction between the civil and criminal sanctions, he was entitled to have the Court instruct the jury that not only were the sanctions independent, but also the Government was not barred from the use of the civil sanction by an acquittal in a criminal prosecution. The Court's refusal to charge as thus requested, defendant submits, constitutes reversible error.

In his request for instruction 51, the defendant asked the Trial Court to charge the jury as follows (R. 644a-645a):

> "51. Willfully aiding or advising in the preparation of a false return is a felony under Section 3793 (B) (1) of the Internal Revenue Code. The purpose of this Section is to reach the advisors of taxpayers who get up the returns and who might wish to keep down the taxes because of the credit they would get with their principals, who might be altogether innocent. Therefore, if the jury should find that the witness, August W. Tross, aided in the preparation of a false return without the knowledge of the taxpayer, Robert E. Stoehr ,the jury must find a verdict of 'Not Guilty' in all counts."

In *Spies v. United States,* 317 U. S. 492, 63 S. Ct. 364, 368, the Supreme Court, has left in no doubt the right of a defendant charged with a violation of Section 145(b) to have his defenses clearly and fairly put. Petitioner submits that the trial court failed to com-

ply with the requirement laid down in the Spies case, for it nowhere in its charge explained to the jury that Tross, under the defendant's theory of the case, might have caused false returns to be prepared by submitting incorrect reports to the accountant for motives and purposes personal to Tross and without the instruction, knowledge or consent of his employer. Defendant was entitled to a charge which would point out to the jury that if the jury found Tross had caused said alleged false returns to be filed because of the credit he would get with Stoehr or because of any other personal motive, and if it should find further that he did so without the knowledge of Stoehr, then it must find the defendant not guilty on all counts even though the defendant may have received the benefits of such returns.

Section 3793(b) (1), I. R. C. was enacted for the purpose of reaching the advisors of taxpayers who get up the returns and who might wish to keep down the taxes because of the credit they would get with their principals, who might be altogether innocent. Congress thus realized that erroneous returns might be filed without the taxpayer's knowledge or instruction and accordingly provided in Section 3793(b) (1) for the punishment of those who prepared such returns under such circumstances.

The failure to give defendant's Request 51 when taken into consideration with the exclusion by the Trial Court of the evidence offered as to Tross' handling of the tax returns not only for the year 1946, but also for the years prior to defendant's purchase of the business

in 1939, *took away from the jury the question of the theory of the defense in this case.* The Trial Court nowhere clearly explains in its charge that the jury might find that Tross alone might have been responsible for any of the alleged false returns, and that he might have committed wrongful acts without the defendant's instruction, knowledge or consent. It was insufficient for the Trial Court to charge the jury (R. 645a) that it must first find "that Tross was an accomplice". The Trial Court should have gone further and instructed the jury that, under the defendant's theory of the case, Tross could have caused the alleged false returns to be filed without the defendant's instruction or knowledge.

Therefore, Petitioner submits that the Trial Court erred in refusing defendant's Request 51 because said request clearly propounded the law applicable to this case and was warranted by the evidence and was not covered thereafter by the general charge.

V.

THE COURT OF APPEALS ERRED IN UPHOLDING THE CONDITION ATTACHED TO DEFENDANT'S PROBATION ON COUNT III

The sentence imposed by the Trial Court (R. 712a-713a) provides with reference to the sentence on Count III:

> "It is adjudged that imposition of sentence is hereby suspended on Count Three of the Indictment, and defendant placed on probation for a period of two (2) years; probation period to commence upon defendant's release from prison after service of sentences imposed on Counts One and Two.
>
> It is further ordered as a condition of probation that the defendant pay all income taxes due the United States Government, with interest and penalties added thereto, not later than ninety (90) days after the commencement of probation period imposed in Count Three."

Petitioner submits that the sentence on Count III is invalid in so far as it imposes as a condition to his probation that he pay all income taxes due the United States Government, with interest and penalties added thereto, not later than ninety (90) days after the com-

mencement of the probation period imposed in Count III. Petitioner does not seek to avoid payment of any taxes which may finally be determined to be due by him to the Government. He does contest, however, the right of the Trial Court to prevent or hamper the adjudication of his civil tax liability in the Tax Court.

In the leading Supreme Court case of *Helvering v. Mitchell,* 303 U. S. 391 (1938), Mr. Justice Brandies, for the Court, analyzed the nature of the fraud penalty, found it to be a civil and not a criminal sanction and concluded that the acquittal of the taxpayer on criminal charges of tax evasion was no bar to the imposition of the civil fraud penalty on the same tax fraud; that neither the doctrine of the double jeopardy, nor res adjudicata applied. This is now the settled rule. Conversely, a conviction on an indictment on a criminal charge for attempted tax evasion does not bar the civil fraud penalty nor does it prevent the taxpayer from proving that no such civil fraud penalty should be imposed.

Petitioner submits that the imposition of the said condition on probation is invalid, since it prevents or hampers his right to contest the normal civil adjudication of his tax liability.

The Court of Appeals interpreted the District Court's order to mean that probation on Count III is conditioned on the payment by defendant of all income taxes *finally determined* to be due for the years involved. The Court stated that if, on the date of his

release from imprisonment there has been no final determination of defendant's tax liability, this condition, unless modified, would thus be inoperative. However, the District Court's right under 18 U.S.C., Section 3651 to condition probation on a defendant's making "restitution or reparation to aggrieved parties for actual damage or loss caused by the offense for which conviction was had * * *" is dependent upon there being a wholly determined amount owed by such defendant.

Petitioner submits that this condition on the probation imposed in Count III, in effect, is a weapon to force him into the payment of his civil tax liability—which issue is at present pending in the United States Tax Court. To allow such condition on petitioner's probation is in apparent conflict with the decision of this Court in Helvering v. Mitchell, *supra,* and entirely dispenses with the distinction between civil and criminal sanctions under the Internal Revenue Code.

CONCLUSION

The Writ of Certiorari should be granted for the reasons hereinbefore set forth and because petitioner was deprived of a fair and impartial trial as outlined above, in violation of United States Constitution, Sixth Amendment.

Respectfully submitted,
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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 151

ROBERT E. STOEHR, Trading as STOEHR AND FISTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 676-711) is reported at 100 F. Supp. 143, and the opinion of the Court of Appeals (R. 734-746) is reported at 196 F. 2d 276.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1952 (R. 746), and an order extending the time to file a petition for writ of certiorari to and including June 23, 1952, was entered

by Mr. Justice Burton on May 20, 1952 (R. 747). The petition for a writ of certiorari was filed on June 23, 1952. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner was unduly restricted in recross-examination of one witness and cross-examination of another.

2. Whether it was error to exclude from evidence an offer in compromise of petitioner's civil and criminal tax liability, which offer was submitted to the Government subsequent to the commission of the offenses charged and the beginning of the investigation, and was rejected by the Attorney General.

3. Whether petitioner's constitutional rights were prejudiced by the fact that the sequestered jury was taken to see a motion picture on an evening during the course of the trial.

4. Whether the trial court's charge to the jury was complete and correct.

5. Whether the sentence imposed on count three was invalid in that it included as a condition to probation that petitioner make restitution to the United States of all income taxes, with penalties and interest, not later than ninety days after commencement of the probation period imposed in the same count.

STATUTE INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

Petitioner was indicted on March 1, 1950 (R. 1), on charges that he wilfully and knowingly attempted to defeat and evade a large part of his income taxes[1] for the years 1943, 1944, and 1945 by filing and causing to be filed false and fraudulent income tax returns for each year in which he

[1] Count one as to 1943 also included victory tax net income and victory tax. The three counts are identical except as to dates and amounts.

knowingly understated his net income and the amount of tax due (R. 676),[2] in violation of Section 145(b), Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 145). He was tried before a jury from May 8, 1950 (R. 2), until May 26, 1950 (R. 3), a total of seventeen court days (R. 676), and a verdict of guilty was returned on each of the three counts of the indictment (R. 3). The jury was sequestered during the course of the trial. (R. 2, 694.)

On September 12, 1951, the petitioner was sentenced to imprisonment for a period of three years and fined $10,000 on count one; three years' imprisonment and $10,000 fine on count two, the prison sentence to run consecutively with that imposed on count one; and to be further imprisoned until payment of fines imposed on counts one and two unless otherwise discharged for non-payment of fines as provided by law. Imposition of sentence was suspended on count three and petitioner placed

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[2] The amounts of income and tax reported by petitioner, the understatements, and the actual amounts may be summarized as follows (R. 679):

	Actual Net Income	Reported Net Income	Net Income Understated
1943	$237,620.40	$ 66,493.95	$171,126.45
1944	174,039.03	78,628.63	95,410.40
1945	164,739.84	60,704.87	104,034.97
	$576,399.27	$205,827.45	$370,571.82

	Actual Tax Due	Reported Tax Due	Tax Understated
1943	$193,547.77	$ 39,261.70	$154,286.07
1944	137,311.05	50,238.05	87,073.25
1945	128,651.46	35,517.80	93,133.66
	$459,510.28	$125,017.55	$334,492.98

on probation for two years to commence upon his release from prison after service of the sentences imposed on counts one and two. (R. 4, 712-713.) As a condition of probation the petitioner was ordered to pay all income taxes due the United States, with interest and penalties, not later than ninety days after the commencement of the probation period imposed in count three. (R. 4, 713.)

Petitioner was sole owner and proprietor of a large retail household furnishing store at Scranton, Pennsylvania, beginning in 1939 (R. 567-568) and continuing until March 15, 1946 [3] (R. 51, 579-580, 677-678), trading as Stoehr and Fister (R. 678). He gave full-time personal attention to the business. (R. 7-10, 572.) A bookkeeper, Edith Passetti, was in charge of the books of original entry (R. 678), and August W. Tross, the office manager, did all the posting, was in charge of the general ledger cards, and prepared petitioner's financial statements (R. 678). Donald C. Griffiths, a certified public accountant, prepared petitioner's income tax returns each year without an independent audit but solely from information prepared by Tross and submitted by petitioner or at his direction. (R. 423-427, 678.) The books of original entry were apparently at all times accurate (R.

[3] On July 1, 1945, petitioner formed three corporations (R. 47), the Robert David Corporation to take over the operation of the drapery department and workrooms (R. 48), the Stoehr and Fister Merchandise Corporation to buy merchandise (R. 48-49), and the R. E. S. Investment Corporation to buy the accounts receivable of the business (R. 49-50). Petitioner was president of all three corporations. (R. 51.)

735), but in each of the years 1943 through 1945 there were false entries in the ledger cards, unsupported by any entries in the books of original entry, whereby sales were understated, purchases and expenses overstated, and petitioner's living expenses, the purchase of $110,000 in United States Government bonds, and $32,847.57 personal life insurance premiums, were disguised as business expenses (R. 678-680, 735).

At the end of 1943 or early in 1944, Tross submitted to the petitioner a profit and loss statement for the year 1943 and, with it, an estimate of the amount of income taxes due. (R. 11-15, 679-680, 735.) Petitioner then decided the amount of taxes he wanted to pay and directed Tross to work out the mechanics of the plan whereby net income could be conveniently "reduced". (R. 13-15, 679-680, 735.) The same was true for the years 1944 (R. 24-25) and 1945 (R. 35-39). Acting upon the instructions of petitioner, Tross made false entries on ledger cards which were accessible only to petitioner and Tross. (R. 735.) Tross then made a rough draft of a false profit and loss statement, which was submitted to and approved by petitioner (R. 14-18, 27-28, 37-42). This statement was then typed in final form and delivered to Mr. Griffiths for use in preparation of the income tax return for each year (R. 28). In 1945 Tross changed the false profit and loss statement three times before petitioner was satisfied with the result. (R. 37-38, 41.) Petitioner was aware at all times of the manipulations by Tross to reduce net income, and the idea of

submitting false records to Griffiths was his. (R. 12-15, 18, 24, 27-30, 37-38, 41-42.)

Petitioner sold his business on March 15, 1946. (R. 51, 579-580, 677-678.) Early in 1947 Griffiths made repeated requests for a balance sheet and reconciliation of the capital account in order to prepare petitioner's income tax return for 1946. (R. 680.) When the information was not forthcoming from petitioner or Tross, who continued to keep petitioner's books although employed by the purchaser of the business, Griffiths became suspicious and demanded that petitioner and Tross meet with him. (R. 680-681.) After much insistence, Griffiths finally obtained the petitioner's books and learned that the figures submitted to him for 1944 were false. (R. 681.) When he confronted petitioner with this fact and asked if the same was true as to other years, petitioner broke down and admitted that the statements furnished Griffiths had been falsified to reduce his income taxes. (R. 681.) Griffiths testified that petitioner admitted his scheme and offered to pay any price, any fee, to keep the matter quiet. (R. 681.)

Petitioner testified that he signed the returns, caused them to be filed, and paid the tax stated to be due thereon; that the 1943 return was false; that in 1943 and 1945, sales and purchases were incorrectly stated; that they obviously varied from those shown in a private personal record prepared by Tross for petitioner's eyes only and kept in his possession; that for the three years in question he paid far less taxes than were due; and that he had

been advised by Mr. Peterson, his present accountant, that there were taxes owed and unpaid of $278,000. (R. 681.) In defense, petitioner insisted that he never read more than the front page of the return; never compared the figures thereon with those in his possession, or checked the calculations made; and that he was not aware of what profits he made despite his many years' experience and the close attention he paid to the details of his business. He denied making any requests or giving any instructions to Tross to falsify his records on his behalf, and claimed ignorance that such things were done. When asked what reason Tross had for conceiving and carrying out such a plan, his only answer was "I don't know." (R. 681-682, 736.)

ARGUMENT

I

a. Petitioner alleges error in the restriction of recross-examination of Tross as to (i) whether Tross had engaged in manipulation of the income tax returns of petitioner's predecessor prior to 1939, and (ii) whether petitioner had overpaid taxes in 1946 on $71,187.40 which Tross had eliminated from the 1945 sales and restored in 1946. (Pet. Br. 25.)

Tross was on the stand for four and one-half days. The restrictions complained of all occurred near the close of recross-examination (R. 346-348),[3a] after extensive cross-examination in which

[3a] Petitioner's brief, p. 25, also cites R. 367-369, but this was not part of the recross-examination of Tross but consisted of cross-examination of the witness R. M. Earley.

all avenues were thoroughly explored.[4] The matters as to which recross-examination was allegedly restricted are clearly collateral,[5] and the extent to which cross-examination may be allowed on collateral matters is peculiarly within the trial court's discretion. *United States* v. *Manton*, 107 F. 2d 834, 845 (C.A. 2d); *United States* v. *German-American Vocational League*, 153 F. 2d 860, 865 (C.A. 3d). The court may exercise reasonable judgment in determining when a subject is exhausted (*Alford* v. *United States*, 282 U.S. 687, 694; *Glasser* v. *United States*, 315 U.S. 60, 83), and may reasonably exclude questions irrelevant to the substantial issues of the case and of slight bearing on the bias and credibility of witnesses (*District of Columbia* v. *Clawans*, 300 U.S. 617, 632). This rule can be applied with even greater force to recross-examination. *Moyer* v. *Aetna Life Ins. Co.*, 126 F. 2d 141, 143 (C.A. 3d). Furthermore, this line of testimony had not been opened up on direct or redirect examination, and the privilege of recross-examination as to matters not covered on redirect examination lies within the trial court's discretion. See 6 Wigmore on *Evidence*, Sec. 1897; *Philadelphia and Trenton Railroad Co.* v. *Stimpson*, 14 Pet. 448.

b. As to the witness Griffiths, petitioner contends

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[4] The cross-examination of Tross covered 223 pages of the Record and recross-examination 66 pages (R. 736).

[5] It is difficult to see how knowledge of when and where Tross learned the art of manipulation of records could have shed any light on the issue before the jury, and how bookkeeping entries in 1946 could have more than collateral relationship to offenses committed in earlier years.

the trial court erred in sustaining objections to questions addressed to him on cross-examination relative to advice given by him to petitioner on the evening of April 22, 1947, and also as to his knowledge of the Treasury Department's policy, usage and practice relative to voluntary disclosures. (Pet. Br. 29.) Petitioner refers to pages 525a-528a, 529a-530a of the record as illustrating the restriction complained of, but it will be noted that in the pages referred to there is but one question that was asked (R. 526); the other pages contain colloquy. The one question related to the "practice of the Treasury Department in voluntary disclosure of fraud", and in sustaining an objection to the question the court said (R. 530):

> We will not preclude defense counsel from asking the witness on the stand whether or not that fully states what he did say to him without attempting to incorporate the Treasury's provisions.

Petitioner contends that this testimony was offered for the purpose of affecting the witness's credibility, but it is highly speculative whether it would have thrown more than infinitesimal light upon the credibility of Griffiths. The exclusion of questions having at most a slight bearing on bias or credibility does not constitute reversible error. *District of Columbia* v. *Clawans, supra.* Furthermore, credibility cannot be tested by raising and trying a wholly independent issue as to a witness's honesty and motives (*Daniels* v. *United States,*

196 Fed. 459, 464 (C.A. 6th)), and petitioner tacitly admits that whether or not he made a voluntary disclosure was not an issue in the case.

Petitioner was given full opportunity for development of all material matters on cross-examination,[6] and the exclusions complained of relate to matters not covered on direct examination. It is the rule in federal courts that cross-examination must ordinarily be restricted to what has been covered on direct, and if a party wishes to examine a witness as to other matters he must do so by making the witness his own and calling him as such in the subsequent progress of the case. *Moyer* v. *Aetna Life Ins. Co., supra; United States* v. *Hornstein*, 176 F. 2d 217, 221 (C.A. 7th); *Philadelphia and Trenton Railroad Co.* v. *Stimpson, supra.*

Alford v. *United States*, 282 U.S. 687, is clearly distinguishable and presents no conflict. Here there was no summary denial *in limine* of petitioner's right of cross-examination, but to the contrary the alleged restrictions came at the close of long and searching cross-examination. Nor was petitioner prevented from showing that the witnesses' testimony was affected by fear or favor. Both Tross and Griffiths were fully identified on direct and cross-examination and placed in their proper setting to put the weight of their testimony and their credibility to a test.

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[6] Direct examination of Griffiths consumes 42 pages of the Record (R. 422-464), and cross-examination consumes 73 pages (R. 464-537).

II

Petitioner asserts as error the exclusion from evidence of an offer in compromise of "all criminal and/or civil liability" for the years 1943, 1944, and 1945, in the sum of $350,000, which offer was submitted to the Bureau of Internal Revenue on July 30, 1948, three years after the filing of the false return for the last year involved in the prosecution. (R. 601-605, 632-637.) The offer was unequivocally rejected on behalf of the Attorney General. (R. 705.) He contends that the offer in compromise was relevant to the issue of intent and wilfulness and to explain his delay in paying his taxes. (Pet. Br. 35.)

It is well settled that after the attempt to defeat and evade tax has been consummated by the filing of a false and fraudulent return, and the fraud has been detected by the Government, a taxpayer cannot escape criminal responsibility merely by paying the additional tax. *United States* v. *McCormick*, 67 F. 2d 867, 868 (C.A. 2d); *United States* v. *La Fontaine*, 54 F. 2d 371, 373 (D. Md.); *Burr* v. *United States*, 86 F. 2d 502, 504 (C.A. 7th), certiorari denied, 300 U.S. 664; *United States* v. *Sabourin*, 157 F. 2d 820 (C.A. 2d); *Slick* v. *United States*, 1 F. 2d 897 (C.A. 7th); cf. *Heindel* v. *United States*, 150 F. 2d 493 (C.A. 6th). The compromise statute [7] affords no shield to one who has violated the tax laws unless there has actually been strict compliance with the terms of the statute involved (*United States* v. *Lustig*, 163 F. 2d 85 (C.A. 2d),

[7] Internal Revenue Code, Section 3761 (26 U.S.C. 1946 ed., Sec. 3761).

certiorari denied, 332 U.S. 775, rehearing denied, 332 U.S. 812; see *Botany Worsted Mills* v. *United States*, 278 U.S. 282). It is not contended here that a compromise was effected.

The increased liberality of some courts in admitting subsequent statements and conduct of defendants does not render admissible every subsequent self-serving act of the defendant, but the trial court must consider the circumstances of each individual case. See *Heindel* v. *United States, supra; United States* v. *Matot*, 146 F. 2d 197 (C.A. 2d); *United States* v. *Wicoff*, 187 F. 2d 886 (C.A. 7th). The lapse in time between the commission of the several offenses and the making of the offer in compromise might well have been considered by the trial court to have destroyed whatever probative value a prompt offer might have had.[8]

Moreover, the court properly withheld evidence of the offer because it might tend to confuse the jury. *United States* v. *Matot, supra*.[9]

The situation here is clearly distinguishable

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[8] By petitioner's own testimony, the offer in compromise was submitted fifteen months after he learned about his false returns and after an almost equivalent amount of time had passed since his newly retained accountant had informed him of the amount of taxes due the Government. (R. 742.)

[9] The Court of Appeals commented upon the language of the offer in compomise as follows (Fn. 10, R. 742-743):

> If interpreted as an offer conditioned on a release of criminal and civil liability, then the offer of compromise should most certainly have been excluded. If the language be interpreted as disjunctive, however, the meaning becomes confused for such interpretation suggests an alternative offer: release of civil liability or release of criminal liability. But the second alternative is a highly incredible one in that it is an offer to release defendant's criminal liability for $350,000, leaving his civil liability unaffected.

from the circumstances of *Heindel* v. *United States*, 150 F. 2d 493 (C.A. 6th), relied upon by petitioner. In the *Heindel* case the defendant filed an amended return, which was introduced by the Government and was, in effect, an admission that the original return was false. Evidence offered by the defense that the additional tax shown thereon was promptly paid was excluded by the trial court; the Court of Appeals reversed not because the trial court would not admit evidence of the prompt payment of the additional tax, but because of the legal inadequacy of the charge covering this issue. The dissenting opinion in the *Heindel* case stated (p. 498) that exclusion of the proffered evidence of prompt payment was harmless error at most and that "* * * prompt payment of the correct tax, after the amended return was filed as a result of the Government's investigation, would not exculpate the defendants from the charge laid in the indictment."

Had the petitioner filed amended returns, such returns might have been admissible as in the *Heindel* case, but no such returns were filed. Instead, he elected to submit an offer in compromise of his tax liability, but even this offer was apparently conditioned upon his release from possible criminal prosecution. Under the circumstances the proffered testimony was properly excluded.

III

Petitioner contends that he was deprived of a fair and impartial trial because the sequestered jury was taken to see a motion picture called "The

Damned Don't Cry" on Friday night, May 19, 1950. On the following Tuesday afternoon, counsel for the defense related to the court his hearsay version of the plot and moved for a a mistrial on the grounds that petitioner's rights had been prejudiced by a few isolated references in the dialogue to income tax matters.

Apart from the hearsay account of counsel, there was no evidence from which the court could determine even a remote possibility of prejudice to petitioner. The burden was on him to establish the reasonable possibility of prejudice, and although the trial lasted for eight days after the motion picture incident, he made no effort to sustain that burden. See *United States* v. *Carruthers*, 152 F. 2d 512, 518-519 (C.A. 7th); *United States* v. *Katz*, 78 F. Supp. 435 (M.D. Pa), affirmed, 173 F. 2d 116 (C.A. 3d); *United States* v. *Griffin*, 176 F. 2d 727 (C.A. 3d). Moreover, the court charged the jury that the case should be decided on the law and evidence produced in the courtroom, nothing else. They were specifically cautioned to disregard anything they saw or heard in the movies, and anything that may have occurred elsewhere in the world except in the courtroom. (R. 666.)

The Government's representatives have not seen the motion picture in question, but a transcript of the dialogue was submitted by defense counsel to the Court of Appeals during oral argument. That court has stated it examined the transcript out of an abundance of caution, and that "A few isolated sentences allude to mistakes in income tax

returns and to lawful ways of reducing taxes. We fail to find anything in the film that could fairly be said to incite prejudice". (R. 744.) See *Himmelfarb* v. *United States*, 175 F. 2d 924, 933 (C.A. 9th), certiorari denied, 338 U.S. 860:

> "The appraisal of the fortuitous incidents of a trial in relation to an accused's rights is a matter primarily for the judgment of the trial judge in the immediate situation, and, unless there has been such an unwise exercise of his discretion as to amount to an abuse, his action will not be disturbed on appeal". *Emery* v. *United States*, 8 Cir., 127 F. 2d 561, 562. See also *Kastel* v. *United States*, 2 Cir., 23 F. 2d 156, certiorari denied, 277 U.S. 604 * * * .

IV

Petitioner contends that denial of three requested instructions was error. The first two requested instructions (Nos. 19 and 24) were in effect that the Government could proceed civilly to collect all taxes due, even if the petitioner should be acquitted. The third requested instruction (No. 51) was in effect that the jury should acquit if it should find that Tross aided in the preparation of the false return without the knowledge of the petitioner.

The duality and separateness of the criminal and civil tax sanctions (*Helvering* v. *Mitchell*, 303 U.S. 391, 399; *United States* v. *Sabourin*, 157 F. 2d 820 (C.A. 2d), were made clear to the jury. It was, of course, not necessary that the court use

the precise language of the requested instructions. *United States* v. *Berg*, 144 F. 2d 173, 177 (C.A. 3d).

The court quoted directly from *Spies* v. *United States*, 317 U.S. 492, 495, as follows (R. 659):

> The penalties imposed by Congress to enforce the tax laws embrace both civil and criminal sanctions.

It explained more fully (R. 633-634):

> We may say to the members of the jury that the question has been asked now about "efforts" having been made to pay taxes over the past several years. May we say to you that in its wisdom and under its authority granted to it by the Constitution of the United States, Congress has passed certain laws, and those laws are for the enforcement of the tax authority and power given to the Congress in the Constitution; and it has provided certain methods to collect taxes. One of the taxes is the income tax, and that method provides for the filing of returns and the paying of the tax and if the tax is incorrect in amount there is a civil proceeding before the Revenue Office at Scranton in this district, the head office of it, and then on to Washington, a civil proceeding as to certain steps that would be taken in the collection of the taxes as to certain disputes arising. In addition to the civil proceeding, Congress has enacted a law which provides that it is a criminal act if you do certain things—let me see the indictment—one of those being if a

person wilfully and knowingly attempts to defeat and evade his income taxes.

This proceeding is under this indictment. We are here under that provision of law in the criminal courts. The reason why we sustained the objection of going into the civil matter and tax liability is that this is the criminal court. This proceeding is before a United States Judge. This is not a civil proceeding to collect taxes. We will say more on that in our charge. We are only explaining to the jury so that they will understand our ruling at this time and so that they will avoid confusion and so that they will understand the difference between a criminal proceeding and a civil proceeding. We are here on this indictment in the United States Criminal Court.

The gist of requested instruction No. 51 was fully covered in the general charge in the following language (R. 657):

> The jury is instructed that there can be no criminal liability upon the part of the defendant for negligence—we previously charged that out of the defendant's points, and we reiterate that—or for anything of which he did not have actual knowledge; that the defendant is not responsible for what Tross did unless such knowledge was actually brought home to him; and the indictment requires proof of actual knowledge and wilfulness upon his part.

It is significant that, as the district judge stated in his opinion (R. 683):

During a recess, immediately upon the conclusion of the court's charge, chief counsel for the defense stated to the court and to the press that it was "one of the fairest charges" he had ever heard, that it was "only the fourth time in his long career in which he took no exceptions to the charge".

V

Petitioner contends the sentence imposed on count three is invalid insofar as it imposes a condition to his probation that he pay all income taxes due the United States, with penalties and interest added thereto, not later than ninety days after the commencement of the probation period imposed in the same count.

18 U.S.C., Sec. 3651, specifically provides for the granting of probation "for such period and upon such terms and conditions as the court deems best". It further provides: "While on probation and among the conditions thereof, the defendant— * * * May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; * * *."

The word "party" includes the Government. *United States* v. *Follette*, 32 F. Supp. 953 (E.D. Pa.). Much latitude is allowed the trial court in the administration of this section (*United States ex rel. Grossberg* v. *Mulligan*, 48 F. 2d 93 (C.A. 2d); *Reeves* v. *United States*, 35 F. 2d 323 (C.A. 8th); *Riggs* v. *United States*, 14 F. 2d 5 (C.A. 4th), certiorari denied, 273 U.S. 719) and acting

under its authority courts have ordered restitution in a variety of cases (e. g., *United States* v. *Berger*, 145 F. 2d 888 (C.A. 2d), certiorari denied, 324 U.S. 848 (restitution of wages to employees after employer's conviction under Fair Labor Standards Act of 1938); *United States* v. *Follette*, *supra* (restitution to surety who had made good embezzled postal funds); *Karrell* v. *United States*, 181 F. 2d 981 (C.A. 9th) (restitution of amounts paid by veterans in purchase of homes in excess of appraised value)). The Government is no less entitled to have restitution of the loss of taxes caused by petitioner's attempt to defeat and evade his tax liability.

CONCLUSION

The decisions of the courts below are plainly correct and present no conflicts. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIORARI DENIED